

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH L. BARKLEY and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, Calif.

*Docket No. 96-117; Submitted on the Record;
Issued March 5, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective September 17, 1995 based on her capacity to earn wages as a telephone solicitor.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly reduced appellant's compensation effective September 17, 1995 based on her capacity to earn wages as a telephone solicitor.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.⁴ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

In the present case, the Office accepted that appellant sustained an employment-related lumbosacral strain and permanent aggravation of degenerative disc disease on March 12, 1973. Appellant stopped work in October 1977 and received compensation for periods of disability. In December 1993, the Office referred appellant to several physicians for medical evaluation and, based on the reports of these physicians, found that appellant was not totally disabled for work and had a partial capacity to perform work for four hours per day subject to specified work restrictions.

In June 1995 appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of telephone solicitor and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position was essentially sedentary but required lifting up to 10 pounds, moving objects, frequent fingering, and occasional typing. By decision dated September 13, 1995, the Office reduced appellant's compensation effective September 17, 1995 based on its determination that appellant was vocationally and physically capable of performing the telephone solicitor position for four hours per day.

The Office based its assessment of appellant's physical capabilities on the reports of several physicians to whom it referred her in December 1993 – Dr. Barry Friedman, a Board-certified orthopedic surgeon, Dr. William Hughson, a Board-certified internist, and Dr. David Hubbard, a Board-certified neurologist. The Board notes, however, that the Office did not meet its burden of proof to establish that appellant was physically capable of performing the telephone solicitor position effective September 17, 1995, the date that it adjusted her compensation.

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Id.*

⁶ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

In a report dated December 13, 1993, Dr. Friedman indicated that appellant had degenerative disc disease of the lumbar and cervical spine. He noted that appellant could work four hours per day but he also noted, in an accompanying work restrictions form, that appellant could not engage in any lifting, pushing or pulling.⁷ As noted above, the telephone solicitor position required lifting and moving objects. In a report dated December 21, 1993, Dr. Hughson indicated that appellant was diabetic, obese and deconditioned; he indicated that appellant could perform some type of work, but he did not provide a clear opinion regarding the extent of appellant's ability to work. In a report dated December 22, 1993, Dr. Hubbard indicated that appellant had neuropathic conditions related to her diabetes, but did not provide a clear opinion regarding appellant's ability to work.

Moreover, it remains unclear to what extent appellant is disabled by conditions which appear to have preexisted her employment injury, such as her diabetes, hiatal hernia and right toe problems. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within her work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of the employee's work capabilities.⁸ As noted above, some of the reports of the Office referral physicians suggest that appellant had diabetes-related restrictions. In a report dated May 25, 1995, Dr. Andrew Blumenfeld, an attending neurologist, indicated that appellant had extensive motor control problems due to her diabetes.

Therefore, the Office did not properly consider all the relevant factors, including appellant's physical limitations, in basing her wage-earning capacity on the position of telephone solicitor⁹ and the Office improperly adjusted appellant's compensation effective September 17, 1995.

⁷ Dr. Friedman indicated that appellant's employment-related orthopedic condition caused the majority of her disability.

⁸ *William Ray Fowler*, 31 ECAB 1817, 1822 (1980). It should be noted, however, that some of appellant's other medical problems, such as her carpal tunnel syndrome, appear to have developed after the occurrence of her employment injury.

⁹ Moreover, it remains unclear why the Office determined that appellant could earn \$140.00 working as a part-time telephone solicitor. The labor survey indicated that the average wage for a part-time telephone solicitor was \$100.00 to \$140.00 per week.

The decision of the Office of Workers' Compensation Programs dated September 13, 1995 is reversed.

Dated, Washington, D.C.
March 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member